BEFORE THE ALCOHOLIC BEVERAGE CONTROL APPEALS BOARD OF THE STATE OF CALIFORNIA

AB-8659
File: 20-410830 Reg: 06062699

7-ELEVEN, INC., HARKIRAT SINGH DHILLON, and GRACIELA SINGH GONZALEZ,
dba 7-Eleven # 2174-21932
4550 Orange Avenue, Long Beach, CA 90807,
Appellants/Licensees

v.

DEPARTMENT OF ALCOHOLIC BEVERAGE CONTROL,
Respondent

Administrative Law Judge at the Dept. Hearing: John W. Lewis

Appeals Board Hearing: December 6, 2007
Los Angeles, CA

ISSUED MARCH 13, 2008

7-Eleven, Inc., Harkirat Singh Dhillon, and Graciela Singh Gonzalez, doing business as 7-Eleven # 2174 21932 (appellants), appeal from a decision of the Department of Alcoholic Beverage Control[1] which suspended their license for 15 days for their clerk selling an alcoholic beverage to a police minor decoy, a violation of Business and Professions Code section 25658, subdivision (a).

Appearances on appeal include appellants 7-Eleven, Inc., Harkirat Singh Dhillon, and Graciela Singh Gonzalez, appearing through their counsel, Ralph B. Saltsman, Stephen W. Solomon, and Ryan M. Kroll, and the Department of Alcoholic Beverage Control, appearing through its counsel, Matthew G. Ainley.

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[1]The decision of the Department, dated November 14, 2006, is set forth in the appendix.

FACTS AND PROCEDURAL HISTORY

Appellants' off-sale beer and wine license was issued on May 4, 2004. On May 2, 2006, the Department filed an accusation against appellants charging that on March 29, 2006, appellants' clerk sold an alcoholic beverage to 19-year-old Michael Martinez. Although not noted in the accusation, Martinez was working as a minor decoy for the Department at the time.

At the administrative hearing held on September 8, 2006, documentary evidence was received, and testimony concerning the sale was presented. The evidence established that the clerk sold a can of Bud Light beer to the decoy. The clerk did not ask the decoy his age or for identification.

The Department's decision determined that the violation charged was proved and no defense was established. Appellants filed an appeal contending: (1) The decoy operation was in violation of rule 141(a) because it was not conducted "in a fashion that promote[d] fairness"; (2) the administrative law judge (ALJ) improperly denied appellants' motion to compel discovery, (3) and the Department violated prohibitions against ex parte communications with the decision maker.[2]

DISCUSSION

I

Rule 141(a) provides that "A law enforcement agency may only use a person under the age of 21 years to attempt to purchase alcoholic beverages . . . in a fashion that promotes fairness." Appellants contend that because the decoy had participated in

[2]Appellants also filed a motion asking the Board to augment the record with any Report of Hearing in the Department's file for this case. Our decision on the ex parte communication issue makes augmenting the record unnecessary, and the motion is denied.

as many as 10 decoy operations before this one and had received police training, he "could no longer act or present himself as a young person under 21 years of age attempting to unlawfully purchase alcoholic beverages. . . . [The decoy] testified that his multiple experiences as a decoy resulted in his not being nervous during this decoy operation. [Citation.] Thus, [the decoy] necessarily comported himself in a manner inconsistent with his actual age." (App. Br. at p. 24.) Appellants insist that fairness under rule 141(a) requires that a decoy have less experience in decoy operations and police duties than this decoy had.

The ALJ, after considering the decoy's physical appearance, demeanor, and experience, found that he complied with rule 141(b)(2), which requires that a decoy "display the appearance which could generally be expected of a person under 21 years of age, under the actual circumstances presented to the seller of alcoholic beverages at the time of the alleged offense." (Findings of Fact 5, 9, & 10.)

Appellants appear to be trying to get around this Board's consistent rejection of the argument that the decoy did not have the appearance of a person under the age of 21 (rule 141(b)(2)) by making essentially the same argument and saying that it was the fairness requirement of rule 141(a) that was violated. Regardless of the rule relied on, this argument must be rejected.

The Department contends that appellants waived this issue because they did not raise it at the hearing. The Department asserts that at the hearing, appellants raised a rule 141(a) argument, but not on the basis of the decoy's experience, and they mentioned the decoy's experience in connection with an argument that the decoy violated rule 141(b)(2), but they have not raised rule 141(b)(2) on appeal. This is a

distinction without a difference. In essence, as mentioned above, appellants are making a rule 141(b)(2) argument here, thinly disguised as a rule 141(a) argument.

Appellants' argument has been made many times over as a rule 141(b)(2) argument, sometimes accompanied by an argument that the fairness requirement of rule 141(a) is also violated by using a decoy whose appearance violates rule 141(b)(2). (See, *e.g.*, *7-Eleven, Inc./P R Cutshaw,Inc.* (2006) AB-8484*; Jaroco Discount Market, Inc*. (2006) AB-8476; *Chevron Stations, Inc.* (2006) AB-8432; *Chevron Stations, Inc.* (2004) AB-8165.) Because arguments regarding these two rules often intertwine, and appellants here appear to have intertwined them *sub rosa*, we see no difficulty in rejecting appellants' argument as we have done in the past with the same argument made under rule 141(b)(2).

This Board has consistently rejected the argument that a decoy's experience or training, ipso facto, makes the decoy appear to be at least 21 years old.

> As we have said many times before, we will ordinarily defer to the ALJ's determination as to the decoy's appearance. The ALJ saw the decoy in person and he considered all the factors relied upon by appellants in making his determination. There is no reason for this Board to question the ALJ's conclusion.

(*7-Eleven, Inc./P R Cutshaw,Inc.*, *supra*.)
Although we have provided lengthier explanations in many cases, the principle is so well established that we need not use more time or paper here.

II

Appellants assert in their brief that the ALJ improperly denied their pre-hearing motion to compel discovery. Their motion was brought in response to the Department's failure to comply with those parts of their discovery request that sought copies of any findings or decisions which determined that the present decoy's appearance was not

that which could be generally expected of a person under the age of 21 and all decisions certified by the Department over a four-year period which determined that any decoy failed to comply with rule 141(b)(2). For all of the decisions specified, appellants also requested all photographs of the decoys in those decisions.

ALJ Gruen, who heard the motion, denied it because he concluded it would cause the Department an undue burden and consumption of time and because appellants failed to show that the requested items were relevant or would lead to admissible evidence. Appellants argue that the items requested are expressly included as discoverable matters in the APA and the ALJ used erroneous standards in denying the motion.

This Board has discussed, and rejected, this argument numerous times before. Just as appellants' arguments are the same ones made before, our response is the same as before. We see no reason to once again go over our reasons for rejecting these arguments. Should appellants wish to review those reasons, they may find them fully set out in *7-Eleven, Inc./Virk* (2007) AB-8577, as well as many other Appeals Board opinions.

III

Appellants contend the Department violated the Administrative Procedure Act (APA)[3] by transmitting a report of hearing, prepared by the Department's advocate at the administrative hearing, to the Department's decision maker after the hearing but before the Department issued its decision. They rely on the California Supreme Court's holding in *Department of Alcoholic Beverage Control v. Alcoholic Beverage Control*

[3]Government Code sections 11340-11529.

Appeals Board (2006) 40 Cal.4th 1 [145 P.3d 462, 50 Cal.Rptr.3d 585] (*Quintanar*) and an appellate court decision following *Quintanar*, *Chevron Stations, Inc. v. Alcoholic Beverage Control Appeals Board* (2007) 149 Cal.App.4th 116 [57 Cal.Rptr.3d 6]. They assert that, at a minimum, this matter must be remanded to the Department for an evidentiary hearing regarding whether an ex parte communication occurred.

The Department disputes appellants' allegations of ex parte communications and asks the Appeals Board to remand this matter so that the factual question of whether such a communication was made can be resolved.

We agree with appellants that transmission of a report of hearing to the Department's decision maker is a violation of the APA. This was the clear holding of the Court in *Quintanar*, *supra*.

Both parties agree that remand is the appropriate remedy at this juncture. We agree, and as we have done in the numerous other cases involving this issue, we will remand the matter to the Department for an evidentiary hearing.

ORDER

The decision of the Department is affirmed as to all issues raised other than that regarding the allegation of an ex parte communication in the form of a Report of Hearing, and the matter is remanded to the Department for an evidentiary hearing in accordance with the foregoing opinion.[4]

FRED ARMENDARIZ, CHAIRMAN
SOPHIE C. WONG, MEMBER
TINA FRANK, MEMBER
ALCOHOLIC BEVERAGE CONTROL
APPEALS BOARD

[4]This order of remand is filed in accordance with Business and Professions Code section 23085, and does not constitute a final order within the meaning of Business and Professions Code section 23089.